Supreme Court, U. S.
FILED
SEP 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1047

CARLA A. HILLS, Secretary of Housing and Urban Development, *Petitioner*

v.

DOROTHY GAUTREAUX, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE

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BRIEF AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

With the consent of the parties, the National Committee Against Discrimination in Housing, Inc. (NCDH) submits this brief *amicus curiae* in support of the plaintiffs-respondents, urging affirmance of the judgment of the Court of Appeals for the Seventh Circuit. That decision, rendered on August 26, 1974, is reported at 503 F.2d 930. It reversed an order of

the District Court which, in ordering the United States Department of Housing and Urban Development (hereinafter "HUD") to develop a remedial housing plan, limited its scope to the City of Chicago.

NCDH was founded in 1950 with the objectives of establishing and implementing programs to eliminate racial segregation and discrimination in housing and to broaden housing opportunities for minority group members, especially those of low-income. Since its inception, NCDH has carried out affirmative programs of research and education in the area of equal housing opportunity.

NCDH has complemented its research and education efforts with a vigorous legal program aimed at securing equal housing opportunity guaranteed under state and federal law. It has initiated litigation and participated as *amicus curiae* in numerous cases involving challenges to discriminatory housing practices and exclusionary land use controls. Among the important recent cases initiated by NCDH are *Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970), and *SASSO* v. *City of Union City,* 424 F.2d 291 (9th Cir. 1970). Among the important recent cases in which NCDH has participated as *amicus curiae* are *Reitman* v. *Mulkey,* 387 U.S. 369 (1967), *Jones* v. *Mayer,* 392 U.S. 409 (1968), *Curtis* v. *Loether,* 415 U.S. 189 (1974), *Warth* v. *Seldin,* 95 S.Ct. 2197 (1975), and *Kennedy Park Homes Ass'n* v. *City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

In the course of its work, NCDH has examined and studied the demographic trends in the metropolitan areas of the nation. We have observed the accelerating racial and economic polarization between city and suburb. This has been mainly a phenomenon of the post-Second World War years and it has not occurred fortuitously. The outward migration to the suburbs of middle- and upper-income whites and the coresponding confinement of low-income minorities to the ghettos of central cities has, in large part, been the result of discriminatory policies by government and private industry.

The federal government—and particularly the Department of Housing and Urban Development and its predecessor agencies—through its own past discriminatory policies, bears a major responsibility for the racial and economic stratification that exists in the nation's metropolitan areas. HUD's sorry record has been documented by both public and private agencies including NCDH. *See* NCDH, *How the Federal Government Builds Ghettos* (1968); *see also* 4 United States Commission on Civil Rights, *Housing* (1961); United States Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974). HUD's discriminatory administration of the low-rent public housing program, specifically the confinement of sites for public housing to areas of minority concentration, has been among the major factors contributing to this racial and economic stratification. It is precisely this discriminatory policy of HUD which the Court of Appeals below held unlawful.

The issue before this Court—whether the Court of Appeals properly remanded the case for consideration of an order for HUD to develop a plan to disperse low-income housing throughout the metropolitan area —is of the highest importance. The resolution of this

issue by the Court will bear significantly on the overall effort to assist low-income minorities in securing their legally protected right to equal housing opportunity, and to reverse the accelerating racial and economic polarization in metropolitan areas.

Finally, it should be stressed that the effect of HUD's unlawful conduct in confining low-income minorities to areas of minority concentration is not limited to the denial of equal housing opportunity, alone. Such discriminatory housing practices, among other results, "have deleteriously produced racial separation in the schools which in turn has had an adverse effect on the education of the children." 6 Presidential Documents 666, 667 (President's Message to Congress, May 21, 1970).

This Court's decision in *Milliken* v. *Bradley,* 418 U.S. 717 (1974), suggests the limits to which the public schools in a metropolitan area can be made to bear the burden of desegregation. "One vehicle can carry only a limited amount of luggage." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 22 (1971). Five years ago, the President of the United States called for an exploration of ways "of shifting to other public institutions a greater share of the task of undoing the effects of racial isolation." 6 Presidential Documents 424, 436 (President's Statement on Equal Opportunity in Education, March 24, 1970). This appeal presents the opportunity to develop, through Federal housing programs and agencies, the alternatives to massive busing as a means of affording equal educational opportunities to central city minorities.

QUESTION PRESENTED

Whether a federal court, in the exercise of its equity powers, may require a federal agency, which has practiced racial discrimination, to develop a remedial plan that extends beyond the geographic area of the proved violation.

SUMMARY OF ARGUMENT

I. There are significant factual differences between *Milliken* v. *Bradley* and this appeal. An examination of these differences demonstrates that *Milliken* does not preclude an order in this case requiring HUD to develop a metropolitan plan for relief. The key differences relate to the identity of the parties against whom the order would run, the kind of order that could provide effective relief, whether an order in this case can be fairly characterized as "inter-district", and the views of the parties affected by the order on the desirability of metropolitan-wide relief and their authority to carry it out.

II. A metropolitan plan for the location of low-income housing outside areas of existing minority and poverty concentrations would be consistent with statutory requirements mandated by Congress and endorsed by HUD in its own regulations. Over the years, Congress has demonstrated a progression in its thinking on national housing policy. More than 25 years ago, Congress established the national housing goal of "a decent home and a suitable living environment for every American family." 42 U.S.C. 1441. Since the Congress, through a series of legislative enactments, has provided substantive meaning to that goal. One such enactment is the Federal Fair Housing law, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*

which is aimed not only at eliminating housing discrimination, but also at achieving racial integration. Another such enactment is the Housing and Community Development Act of 1974, which seeks to reduce concentrations of lower-income families in central cities and facilitate access to suburban parts of metropolitan areas. HUD, through a series of regulations, has endorsed these twin policies of racial integration and dispersal of lower-income housing outside central cities.

III. The issue in the instant case does not involve the difficult administrative, fiscal, and practical problems of *Milliken*. The issue here is the far simpler one of equitable discretion. Under numerous federal court decisions, including those by this Court, an order requiring HUD to develop a metropolitan plan for relief would be a proper exercise of the equity power of federal courts. Such an order is well within the traditional equity power of the courts and the facts of this case make such an order eminently appropriate.

ARGUMENT

I. Because of the Significant Factual Differences Between Milliken v. Bradley and this Appeal, An Order Requiring HUD to Develop a Metropolitan Plan Is Not Precluded by the Milliken Decision.

In its brief, HUD rests its case almost entirely on this Court's decision in *Milliken* v. *Bradley*, 418 U.S. 717 (1974). HUD argues that the "inter-district" remedy rejected by this Court in that case applies with equal force to *Gautreaux*. NCDH contends that a careful analysis of *Milliken* discloses at least four significant factual differences between that case and the present appeal. These factors, taken together, demonstrate that the *Milliken* decision does not preclude a

federal court from ordering HUD to develop a metropolitan plan for relief.

The four key differences between the two cases are:

(1) The order in this case runs only against HUD, found to have been engaged in housing discrimination; in *Milliken*, the order ran not only against governmental bodies guilty of racial discrimination, but also against a large number of jurisdictions which had not practiced any racial discrimination.

(2) The order here would not act coercively against anyone other than HUD. In *Milliken*, innocent parties were directly affected by the order.

(3) The order here is not "inter-district" within the meaning of *Milliken*.

(4) The only party affected by the order—HUD—agrees that a city-only plan will not work. In *Milliken*, the affected parties strongly disapproved of a metropolitan plan.

Each of these distinctions will be examined in turn.

A. Parties affected by the order.

In *Milliken*, the order for relief would have applied not only to the state of Michigan and the Detroit school board, both of which had been found guilty of unlawful conduct, but also to more than 50 suburban school districts, not a single one of which had been found guilty of any wrongdoing. The issue presented to this Court in *Milliken* was whether a federal court could impose an order on these suburban school districts, in the absence of any finding of wrongdoing on their part.

By contrast, in the instant case, the only issue before this Court is whether the United States Department of

Housing and Urban Development, which has been found guilty of unlawful conduct, may be required to develop a metropolitan plan for relief. The judgment of the Court of Appeals below runs only against HUD.[1] Consequently, the order of the Court of Appeals, in remanding the case for further hearing, is to be evaluated only as it affects HUD.

Thus, in *Milliken,* the order considered by this Court was one that would have applied not only to parties found guilty of wrongdoing, but also to some 50 innocent governmental entities. In *Gautreaux,* the order to be considered by this Court applies only to HUD, whose wrongdoing has been established.

B. Nature of the Order.

In the instant case, as in *Milliken,* no specific metropolitan plan is before this Court for review. In *Milliken,* however, it was clear that the metropolitan remedy would require, in effect, consolidation of more than 50 independent school districts. It was also clear in *Milliken* that the order, in addition to causing substantial logistical, administrative, and fiscal problems to the various school systems, would also cause substantial problems to suburban and city residents alike, by assigning city and suburban school children to schools across district lines. Thus, in *Milliken,* although the precise nature of the ultimate order had not yet been determined, this Court was presented with a factual situation in which there was no question that the ultimate order would involve the coercive force of the federal courts, not only upon suburban school districts, but upon children and their families, with inevitable administrative, fiscal and practical problems.

[1] Neither the Chicago Housing Authority nor any of the recently joined housing agencies is a party to this appeal.

In the instant case, no such coercion upon innocent parties is involved and no similar problems flow from the ultimate order. The Court of Appeals below remanded the case to the District Court "for additional evidence and for further consideration of the issue of metropolitan area relief in light of this opinion and that of the Supreme Court in *Milliken* v. *Bradley.*" 503 F.2d at 940. As noted above, this judgment runs only against HUD and the sole issue before this Court is whether that federal agency, guilty of unlawful conduct, may be required by the Court to develop a metropolitan plan for relief. Thus, the contentions of the Government regarding the impact of a metropolitan plan on suburban jurisdictions are, at the least, premature, putting aside the question whether the United States has "standing" to raise those objections.

Equally important, it is likely that a HUD designed metropolitan plan will not involve a coercive order against any innocent parties, such as suburban public housing authorities, suburban municipalities, or individual families. This is true, in large part, because of the nature of the federal programs now available to HUD by which it can implement a plan for relief.

The Housing and Community Development Act of 1974, 88 Stat. 633, *et seq.,* effected substantial changes in the nature and operation of federal housing and urban development programs. Among the programs significantly changed under the 1974 Act is the low-rent public housing program which HUD administered in a discriminatory fashion in Chicago. The basic public housing law, the United States Housing Act of 1937,

42 U.S.C. 1401, *et seq.*, has been revised to include a new approach to public housing, embodied in "Section 8" of the revised public housing law. In fact, the Section 8 program is now the only public housing program in being.[2]

There are significant differences between the operation of the new Section 8 program and public housing under the earlier programs. Prior to the 1974 Act, federal law authorized two basic types of public housing: new construction ("conventional"), 42 U.S.C. 1401 *et seq.*, and leased housing ("Section 23"), 42 U.S.C. 1421b. Both kinds of public housing depended upon the participation and approval of local public housing agencies and local municipalities. If the local public housing agency did not apply for funds to HUD, public housing simply could not be built. And even if the local public housing agency did desire federal funds, the approval of the local municipality was still necessary before construction could begin, 42 U.S.C. 1415(7)(b), or before leased housing could become available. 42 U.S.C. 1421b(a)(2).

In contrast, under the new Section 8 program, HUD is authorized to provide low-income housing without the participation and approval of local agencies and municipalities. It may deal directly with the private housing and home finance industry; it is not required to work through local public housing agencies nor is approval by local minicipalities required.

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[2] The leased public housing program ("Section 23") has been replaced by Section 8 under the 1974 legislation. The new construction public housing program ("conventional"), while continued under the 1974 legislation, has been effectively terminated by HUD's administrative decision.

Under Section 8, HUD may perform the function of a local public housing agency and deal directly with owners of existing housing in areas where no local public housing agency has been organized or where the local agency is unable to implement the provisions of the program. 42 U.S.C. 1437f(b)(1). Further, HUD may deal either with local public housing agencies or directly with housing owners for construction of new Section 8 housing. 42 U.S.C. 1437f(b)(2). And local communities no longer have any veto power over the program. For the program to operate in any area, Section 8 generally requires only that there be a need for subsidized housing, a determination ultimately made by HUD.[3]

The differences between the old and new programs have enormous significance for this appeal. Under Section 8, Congress authorizes HUD to call upon the resources of the private housing industry to provide low-income housing, without regard to the participation of local public housing agencies and without the approval of local jurisdictions. Thus, Section 8 can be utilized to effectuate any metropolitan plan designed by HUD, and the federal court order would not have to require any local public housing agency nor any local municipality to take any special action.

Local public housing agencies, of course, could voluntarily participate in any plan devised by HUD. But in the event they did not, HUD is authorized under the new Act to deal directly with the private sector of the housing industry. And the function of local municipalities is the same function they perform regarding

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[3] See *infra* at 20.

non-subsidized housing. If a HUD contractor, for example, decided to build Section 8 housing in a particular community, he would make the usual application for a construction permit, complying with all local zoning regulations in the process. The Government's contention that this ordinary application of zoning laws, applicable to all housing, somehow constitutes special "control" over Section 8 housing is inaccurate, particularly when compared with the veto power exercised under the old public housing program.[4]

Because the operation of the new Section 8 program does not depend on the existence of a local public housing agency and its willingness to participate in the program, nor on the express consent of local jurisdictions, low-income families in Chicago will now have the opportunity to live outside the central city where the overwhelming majority of public housing units in the Chicago metropolitan area are now located and where the overwhelming majority of low-income minorities are now concentrated. It is important to stress that, unlike the situation in *Milliken,* where suburban and central city school children would have been *required* to attend schools across district lines, the ultimate order in the *Gautreaux* case would have no such coercive effect.

A plan for the location of public housing outside the City of Chicago in suburban parts of the metropolitan area would cause no disruption to families already liv-

[4] Needless to say, if the local community exercised its zoning powers in a racially discriminatory manner, it would be subject to challenge in the federal courts. *See United States* v. *City of Black Jack,* 508 F.2d 1179 (1974) *cert. denied* 95 S.Ct. 2656 (1975); *United Farmworkers* v. *City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974); *Kennedy Park Homes Ass'n* v. *City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

ing in these suburban jurisdictions. Needless to say, they would not be *required* to relocate into the central city, nor would their children be *required* under this plan to attend schools across district lines. The only change in their lives or in the environment in which they live would be that the central city minorities would have the opportunity to live among them. As for central city public housing residents, the effect of the plan would be to afford them—many for the first time—the opportunity to live outside areas of minority concentration. Central city residents as well would not be *required* to move to suburban areas, but would be given the opportunity to do so if they choose.

Thus, a key distinction between the issue before this Court in *Milliken* and in *Gautreaux* has to do with the element of coercion. Although in neither case was there a specific order for this Court to review, in *Milliken* it was clear that the order would involve the coercive force of the Court, brought to bear not only upon agencies found guilty of unlawful conduct, but also upon more than 50 school districts and, ultimately, upon school children and their families. In *Gautreaux,* the only party contesting the decision of the Court of Appeals below is HUD and HUD has been found guilty of unlawful conduct. A feasible and effective metropolitan plan for relief could be developed which would involve no coercion against any parties other than HUD, the acknowledged wrongdoer.

C. "Inter-District" Relief.

The Government has sought to characterize the issue before the Court as solely one involving "inter-district relief", thus bringing the case within the confines of *Milliken.* NCDH contends that the question presented

for review does not involve an "inter-district" remedy within the meaning of *Milliken.*

The term "district," whether "inter" or "intra", has no real meaning in the present circumstances where the single petitioner, HUD, which has metropolitan-wide jurisdiction, is challenging an order to develop a housing plan within this geographic area. In *Milliken,* which involved an order against some 50 separate and independent school districts, the Court accurately described the issue as one of "inter-district relief." In *Gautreaux,* by contrast, the question concerns an order only against HUD. No other parties—certainly not school districts—are involved. As discussed earlier, although no specific order has been entered in this case, the final judgment will not involve coercion of other parties, governmental or private.

Of special importance is an understanding of the key differences in the relevant geographical unit utilized in the separate and disparate fields of education and housing. In education, as this Court noted in *Milliken,* the relevant geographical unit is the school district. Decisions on school policy, including location of schools and school attendance, are made by individual school boards in those school districts. In housing, the relevant unit is not a "district," nor even an individual locality, but rather, as HUD concedes, the "housing market." And as HUD also concedes the "housing market" in this case is the metropolitan area.[5]

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[5] According to HUD: "For practical purposes, the Standard Metropolitan Statistical Area may be delineated as the housing market area in those cases where an SMSA has been established." Department of Housing and Urban Development, *Federal Housing Administration Techniques* 12-13 (Jan. 1970).

To be sure, housing markets—or metropolitan areas —are made up of a number of local jurisdictions. But these local jurisdictions do not ordinarily build housing, nor do they make the key decisions on the construction of housing. These decisions are made by builders and, in the case of federally assisted housing, by HUD as well.

Builders determine the location of housing on the basis of market analyses that show the existence of a market—a market that is not restricted by local jurisdictional lines. In the case of federally assisted housing, HUD is very closely involved, conducting its own market analyses to determine the feasibility and acceptability of the builders' proposals before providing necessary funding or mortgage insurance. The role of the localities is limited largely to assuring that whatever housing is built complies with local zoning laws and to providing necessary municipal facilities and services.

Builders and HUD, the main actors in the construction of housing, necessarily treat the metropolitan area as a single housing market. In short, for housing purposes, local boundaries carry little meaning. To the extent the term "district" has any meaning for purposes of the instant case—and NCDH contends it does not—it must embrace the Chicago metropolitan area.

Thus, in *Milliken* and in *Gautreaux* this Court, dealing with the different fields of education and housing, necessarily deals with two entirely different relevant geographical areas—in *Milliken,* the various independent school districts, of which there were some 85 in the Detroit metropolitan area; in *Gautreaux,* the sin-

gle "housing market" consisting of the entire metropolitan area. To characterize as "inter-district", the yet unknown order in the instant case to develop a metropolitan plan for relief is to distort a concept that carried special meaning in *Milliken* and arbitrarily seek to apply it to a totally different case where that concept is irrelevant.

D. A metropolitan plan for relief is both desirable and feasible.

HUD does not contest the desirability nor the need for locating public housing on a metropolitan-wide basis. As the Court of Appeals noted, all the parties concur in that judgment:

> While they disagree as to what relief the District Court should order, the parties are in agreement that the metropolitan area is a single relevant locality for low rent housing purposes and that a city-only remedy will not work. *Gautreaux* v. *CHA*, 503 F.2d at 937.

Nor is there any question that HUD has ample authority, power, and jurisdiction outside the City of Chicago, extending to the entire metropolitan area. HUD's objection is only to the *requirement* that it develop a metropolitan plan, not to its need or desirability, nor to its lack of authority. HUD supports and, indeed, advocates the aim of a plan which would locate public housing throughout the Chicago metropolitan area. It simply does not want to be ordered to develop such a plan, despite the fact that it has been found guilty of unlawful conduct and now is obliged to remedy the effects of its unlawful conduct.

This is in sharp contrast to the situation in *Milliken*. There, the defendants strongly objected to metropolitan

school desegregation as well as to their being required to develop a plan to achieve that end. Moreover, those more than 50 defendant school districts, unlike HUD, had not been found guilty of any wrongdoing.

II. Development of a Plan for the Location of Low-Income Housing Outside Areas of Existing Minority Concentration Throughout the Metropolitan Area Would Be Consistent With Statutory Requirements Mandated by Congress and Endorsed by HUD in Its Own Regulations.

The issue in this case is whether a federal court may order HUD, after finding HUD guilty of denying to low-income minorities the opportunity to live outside areas of minority concentration, to develop a metropolitan plan for relief. NCDH contends that to a large extent such an order would constitute nothing more that what is already mandated under various statutes enacted by Congress and under HUD's own regulations.

From the time of the first enactment of the federal public housing legislation in 1937, Congress recognized that the metropolitan area was the relevant geographical unit for public housing purposes and that the solution to the housing problems of the poor should not be sought solely within the confines of the inner-city. In the United States Housing Act of 1937, the first comprehensive federal legislation for the construction of public housing, Congress indicated its recognition that the metropolitan area was the relevant geographical unit by defining low-income families to include those "who cannot afford to pay enough to cause private enterprise in their locality *or metropolitan area* to build an adequate supply of decent, safe and sanitary dwellings for their use." 42 U.S.C. 1402(2) (emphasis added).

Several years later, in enacting legislation for the compulsory improvement or elimination of "unsafe or unsanitary dwelling units" comparable in number to newly built low-rent units, Congress allowed the improvement or demolition to occur in the "localities *or metropolitan area.*" 42 U.S.C. 1410(a) (emphasis added). The Senate Report emphasized the need to provide suburban housing opportunities for central city slum dwellers if those slums were to be eliminated.

> It is, of course, perfectly apparent that the elimination of residential slums in central city areas and their redevelopment in accord with a plan for the most appropriate use of the land therein (i.e., for public use, for industry, for housing at more appropriate density, etc.) makes necessary a dispersion of families now living in such slums. Federal loan assistance for the acquisition and preparation of open unplatted urban *or suburban land* to be developed for predominantly housing use, so that adequate provision can be made for the necessary dispersion of some portion of the central city population, is therefore essential to any effective slum clearance operation, and is entirely appropriate. S. Rep. No. 84, 2 *U.S. Code Cong. and Ad. News,* 1550, 1564 (1949) (emphasis added).

See also H.R. Rep. No. 590, 81st Cong., 1st Sess. 16 (1949). (Committee on Banking and Currency).

The public housing program, however, failed to produce the construction of low-income housing outside areas of racial concentration in central cities. Although Congress clearly contemplated the dispersal of such housing throughout the metropolitan area, the veto powers provided to local communities under the old

program had the effect of frustrating the achievement of this end.

In enacting the Housing and Community Development Act of 1974, Congress once again explicitly recognized the need to afford low-income families housing opportunities outside central cities. In its statement of "Findings and Purpose," Congress expressly referred to the problems stemming from "the concentration of persons of lower income in central cities. . . ." 42 U.S.C. 5301. Consistent with this important statement of "Findings and Purpose," Congress also declared that among the specific objectives of the legislation are "the reduction of the isolation of income groups within communities and geographical areas" and "the spatial deconcentration of housing opportunities for persons of lower income." *Ibid.*

In the new legislation which, as noted earlier, significantly changes the nature and operation of federal housing and urban development programs, Congress shaped the substantive programs so as to facilitate housing opportunities for lower-income families outside central city areas where these families have traditionally been confined. First, among the conditions of eligibility for community development block grants under Title I of the Act, a municipality must submit a "housing assistance plan" which, among other things, provides for the housing assistance needs of lower-income persons "residing in *or expected to reside* in the community" (emphasis added). It mandates that site selection for low-income housing be undertaken with the objective of "avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons. . . ." 42 U.S.C. 5304(a)(4).

Second, in establishing Section 8 as the principal federal program to provide housing for the poor, Congress eliminated the provisions governing previous public housing programs that permitted individual localities to prevent the construction of public housing within their borders. Localities that have submitted applications for community development block grants may object to the construction of Section 8 housing *only* on grounds that the housing is inconsistent with the locality's housing assistance plan. 42 U.S.C. 1439 (a)(2). Even so, if HUD disagrees, the housing will be built despite the locality's objections. *Ibid.*

Third, contrary to the Government's contention, localities that decide to do without community development funds for fear that lower-income minorities will move in as a result of the required housing assistance plan cannot, by this means, exclude Section 8 housing and the lower-income minorities who would reside in it. Under the Act, HUD may approve applications for Section 8 housing in such localities if the Department determines that there is a need and there are or will be adequate public facilities and services. 42 U.S.C. 1439(c).

Thus, Congress, through its legislative enactments, has demonstrated a progression in its thinking on housing policy and programs, particularly as they relate to the needs of the poor. Congress has acknowledged that mere recognition of the need to deal with the problem of the "concentration of persons of lower income in central cities" is not sufficient. It now has also established mechanisms to locate that housing outside those areas. The new Act, by requiring localities that desire federal assistance in the form of community development block grants to deal also with the

housing needs of lower-income families—not only those already residing there, but also those "expected to reside" in the community, seeks to facilitate access of lower-income central city residents to suburban parts of the metropolitan area. To aid in securing such access, Congress has established a new public housing program, Section 8, which can operate freely throughout metropolitan areas without the veto power suburban jurisdictions exercised over previous programs.

Congress has matched its concern over the need to eliminate the isolation of low-income families with a similar concern over the need to eliminate racial isolation as well. In 1964, Congress passed Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, prohibiting discrimination in federally assisted programs, including public housing. In 1968, Congress enacted the federal fair housing law, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* The stated policy of Title VIII is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. There is a depth of meaning to the term "fair housing." To be sure, it is concerned with eliminating housing discrimination. But as this Court noted in quoting approvingly from the legislative history of Title VIII, in its decision in *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1973), the reach of the federal fair housing law also is "to replace the ghettos 'by truly integrated and balanced living patterns.'" Moreover, Congress has expressly directed the Secretary of HUD to "administer the programs and activities relating to housing and urban development in a manner *affirmatively* to further the policies of [Title VIII)]." 42 U.S.C. 3608(d)(5)

(emphasis added). See *Shannon* v. *HUD,* 436 F.2d 809 (3rd Cir. 1970).

For more than 25 years, Congress has consistently maintained as the cornerstone of our national housing policy the goal of "a decent home and a suitable living environment for every American family." 42 U.S.C. 1441a. Over the years, Congress has embodied this goal with substantive meaning, both quantitative and qualitative.

In 1968, Congress quantified the goal by calling for the construction, within the next decade, of 26 million housing units, six million of which would be for lower-income families. *Ibid.* Congress has also recognized, however, that the goal cannot be achieved solely by means of increased housing production and that for the poor, particularly the minority poor, it cannot be achieved through their continued confinement to central city areas of minority and poverty concentration. Thus, the fair housing law seeks "to replace the ghettos 'by truly integrated and balanced living patterns.' " The economic equivalent of this policy of racial integration is contained in the Housing and Community Development Act of 1974, legislation aimed at reducing concentrations of lower-income families in central cities and facilitating access to suburban parts of metropolitan areas.

HUD, the agency charged with responsibility for administering and enforcing both the federal fair housing law and the Housing and Community Development Act of 1974, has, through a series of administrative regulations, endorsed this metropolitan approach to the housing needs of minorities and the poor. Also, through administrative regulations, HUD

has established policies to facilitate access by minorities and the poor to suburban housing and to avoid areas of minority and poverty concentration.

Thus, in its "Affirmative Fair Housing Marketing Regulations," HUD requires that developers of subsidized and unsubsidized federally assisted housing formulate marketing programs that respond to the racial and ethnic population characteristics of the housing market area, not individual municipalities. 24 C.F.R. 200.610. Specifically, HUD requires that assisted builders of housing in white, suburban areas adopt marketing techniques to attract minorities. Department of Housing and Urban Development, HUD Circular 8030.3, revised, App. 2 at 3 (June 1973).[6]

In its "Project Selection Criteria," HUD establishes priorities for funding applications for federally subsidized housing. The criteria operate within the metropolitan area, without regard to the boundaries of individual local jurisdictions. Among the standards specified by HUD is that the housing must result in "Improved location for low(er) income families," the first objective being "to avoid concentrating subsidized housing in any one section of a metropolitan area or town." 24 C.F.R. 200.700. Another standard is "Minority Housing Opportunities," an objective being "To open up nonsegregated housing opportunities that will will contribute to decreasing the effects of past housing discrimination." *Ibid.* The highest priority is accorded to a proposed project located "so that, within the housing market area, it will provide opportunities for minorities for housing outside existing areas of mi-

[6] HUD's nondiscrimination requirements for community development block grants extend to communities not guilty of prior discrimination. 24 C.F.R. 570.601(e)(4)(ii).

nority concentration and outside areas which are already substantially racially mixed." *Ibid.*

Parallel to its implementation of the Fair Housing laws, HUD's regulations governing the new Section 8 program require:

> The site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons. 24 C.F.R. 883.209(a)(3).

The Congressional purpose to reduce the isolation of low-income families is reflected in HUD's regulations governing community development block grants as well. HUD requires that the requisite housing assistance plans must take into account the needs of lower-income persons already residing in the community "or planning or expected to reside in the community as a result of planned or existing employment facilities." 24 C.F.R. 570.303(c)(2).

Thus, HUD regulations consistently treat the housing market as the relevant geographical area in determining how federal programs will operate. Further, these regulations, in combination, reflect a policy aimed at reducing isolation of minorities and the poor and opening up housing opportunities for these families outside central city areas where they previously were confined, throughout the housing market, or metropolitan, area.

NCDH contends that the issue raised by the decision of the Court of Appeals below—whether a federal court may consider an order requiring HUD to develop a metropolitan plan for relief—has, in part, already been resolved by Congress and by HUD itself. The conclu-

sion that "this nation is committed to a policy of balanced and dispersed public housing," *Crow* v. *Brown,* 332 F.Supp. 382, 390 (N.D. Ga. 1971), *aff'd* 457 F.2d 788 (5th Cir. 1972), accurately reflects national housing policy as expressed by statute and HUD regulation. By the same token, the combination of housing and civil rights laws, and HUD regulations implementing those laws, provide full support for HUD to administer its programs in the Chicago area on a metropolitan-wide basis. When these statutory and regulatory mandates are considered in light of HUD's racially discriminatory public housing practices in Chicago, the judgment of the Court of Appeals, calling upon HUD to design a plan to disperse low-income housing on a metropolitan basis, becomes eminently appropriate.

III. An Order Requiring HUD to Develop a Metropolitan Plan for Relief Would Be Within the Equity Power of Federal Courts, as Approved by This Court and Lower Federal Courts.

As discussed earlier, in *Milliken,* this Court was presented with the question whether a federal court could order some 50 independent government agencies to undertake affirmative action to correct the effects of past discrimination for which (according to the record) they bore no responsibility. The Court ruled that, absent a showing of an "inter-district" violation or wrongdoing on the part of the government agencies, such an order was beyond the equity power of the Federal courts.

The instant case does not involve the difficult administrative, fiscal, and practical problems of *Milliken,* nor the thorny problems involved in subjecting innocent parties to an order by the federal court. The question before the Court in this case is far easier. It is simply whether a federal court, in the exercise of its equity

powers, may require a federal agency, which has practiced racial discrimination in the location of public housing, to develop a remedial plan that extends beyond the geographic area of the proved violation. The issue is one of equitable discretion. After all, although HUD's illegal practices occurred within the City of Chicago, its authority, power, and jurisdiction in the housing market area of which Chicago is a part, extend to the entire metropolitan area.

Thus, Milliken is relevant to the present appeal only to the extent that it sets the parameters for "the appropriate exercise of federal equity jurisdiction." *Milliken* v. *Bradley,* 418 U.S. 717, 753 (Stewart, J. concurring). The difficult problems which the Court in *Milliken* perceived as barring a remedy that went beyond the Detroit city limits are simply not present here.

The Government's opposition to a metropolitan plan rests largely on "the long-standing equitable principle that the relief ordered should be no broader than the violation found." That contention demonstrates a fundamental misunderstanding of the scope of the equitable jurisdiction of the federal courts. As this Court has stressed: "In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices." *International Salt Co.* v. *United States,* 332 U.S. 392, 401 (1947). This Court has long recognized that, in litigation seeking injunctions in public interest cases, "relief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Co.,* 340 U.S. 76, 90 (1950).

> [T]he court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. *Porter* v. *Warner Holding Co.,* 328 U.S. 395, 398 (1946).

These principles have particular application in actions, as here, which concern the public, not merely disputes between private individuals. "And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Ibid.* Cases in which racial discrimination has been found clearly call for a very expansive application of the injunctive authority of the federal courts. As this Court emphasized in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra* at 15:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexbility are inherent in equitable remedies.

See also Louisiana v. *United States,* 380 U.S. 145 (1965); *Brown* v. *Board of Education,* 349 U.S. 294 (1955).

The precedents not only provide general authority to support the judgment of the Court of Appeals but also are important for the specific remedies they sustained. *United States* v. *United States Gypsum Company, supra,* has particular significance for the case at bar. In *Gypsum,* the United States sued to enjoin a combination and conspiracy in restraint of trade in gypsum products. The Government's complaint and proof were limited to the defendants' activities in the eastern territory of the United States. The United States argued that, in order to make the relief effective

and to correct the effects of the prior illegality, the decree must extend to defendants' business operations throughout the United States, not merely to those in the eastern territory. This Court reversed the lower court's rejection of that remedy, recognizing "that relief, to be effective, must go beyond the narrow limits of the proven violation." *Id.* at 90.

The *Gypsum* case is indistinguishable from the present appeal. There, as here, the proved violation occurred in a limited geographic area. There, as here, the defendants' activities extended beyond the area of the violation. In *Gypsum,* as in this case, the defendant argued that relief must be restricted to the area of the violation. There, as here, relief could only be effective if it extended outside the geographic boundaries of the proved illegality. If anything, the decree in the instant case, where relief would extend only through the housing market area, would be less severe than in *Gypsum,* where the decree extended nationwide.

The principle that an equitable decree may be applied to a defendant's operations outside the geographic area of the demonstrated unlawful conduct has been applied by the lower federal courts. In *Brennan* v. *J. M. Field Inc.,* 488 F.2d 443 (5th Cir. 1973), *cert. denied,* 419 U.S. 881 (1974), for example, the Secretary of Labor sued to enjoin sex discrimination against women under the Equal Pay Act. The proof showed that the defendant had violated the Act with respect to supervisory employees at three stores in one state. The Court of Appeals affirmed an order enjoining the defendant from engaging in discriminatory practices at more than 60 stores in 11 states. *See also Beneficial Finance Company of Wisconsin* v.

Wirtz, 346 F.2d 340 (7th Cir. 1965). In *Brennan,* as in this case, the proof showed illegal practices by the defendant in a limited part of its business, but the decree extended to other operations outside that confined geographic area, in fact, to other states. *See J. P. Stevens & Co.* v. *NLRB,* 380 F.2d 292 (2d Cir. 1967), *cert. denied,* 389 U.S. 1005 (1967) (Court of Appeals approved an NLRB order which required the posting of remedial notices in 43 plants even though the evidence showed a violation at only 20 plants.)

In numerous other decisions, this Court and lower federal courts have approved decrees that extend beyond the area of the proved violation. Those cases are not limited to geographic considerations. They cover a wide range of defendants' activities not shown to be unlawful. In *International Salt Co.* v. *United States, supra,* this Court, in an antitrust case, approved a remedial provision which enjoined the defendant from discriminating against applicants seeking to lease its machines. Although there was no proof that such discrimination had in fact occurred, this Court deemed it an appropriate form of relief to close the "untraveled roads" to illegal conduct. It expressly rejected the defendants' contention, asserted by HUD in this case, "that the injunction should go no farther than the violation or threat of violation." *Id.* at 400.

Similarly, in *Louisiana* v. *United States, supra,* a case involving racial discrimination in voting, this Court affirmed a lower court decree enjoining the use of a new voter qualification test which had not been shown to be unlawful.

> We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory

effects of the past as well as bar like discrimination in the future. *Id.* at 154.

See also United States v. *Jefferson County Board of Education,* 372 F.2d 836 (5th Cir. 1966), *aff'd en banc* 380 F.2d 385 (5th Cir.) (per curiam), *cert. denied,* 389 U.S. 840 (1967) (Court of Appeals affirmed school desegregation order which, *inter alia,* included provisions relating to the construction of new schools even though there was no proof of discriminatory site selection); *Hodgson* v. *First Federal Savings and Loan Association of Broward County,* 455 F.2d 818 (5th Cir. 1972) (Court of Appeals reversed a district court order which limited injunction in age discrimination in employment cases to classification where illegality proved); *United States* v. *Ward,* 349 F.2d 795 (5th Cir. 1965) (Court of Appeals authorized expansion of injunction to protect potential as well as actual victims of voting discrimination); *Adams* v. *Richardson,* 356 F. Supp. 92 (D. D.C.), *aff'd* 480 F.2d 1159 (D.C. Cir. 1973) (Court ordered Department of Health, Education and Welfare, *inter alia,* to institute a civil rights enforcement program respecting public vocational and other special schools in at least 17 states based on evidence of non-compliance in one state).

Against this background, it is clear that a federal court may order HUD to devise a remedial plan which extends beyond the geographic area of the proved violation. It remains only to show the appropriateness of that decree in this case. NCDH believes such a judgment may rest independently on any of the following grounds.

First, it must be kept prominently in mind that here beneficiaries (the plaintiffs) are low-income black persons who are victims of HUD's discriminatory

practices. They have been denied the opportunity to live in public housing located outside areas of racial concentration. Because of the housing discrimination practiced by HUD, these minority persons were and are confined to housing built in minority neighborhoods.

Because HUD actively participated in a program which excluded low-income black persons from white residential areas, it is appropriate now to require HUD to provide housing opportunities outside racially impacted areas. HUD apparently does not disagree with that contention. Nor does HUD contest the desirability of providing such opportunities outside the City of Chicago. HUD merely asserts that, to the extent it is *ordered* to locate new units outside areas of minority concentration, the order should be limited to the City of Chicago.

NCDH contends that such a limitation would not provide low-income minorities the fullest opportunity to reside outside areas of minority concentration, and the denial of this opportunity is the basic wrong that HUD has done to them. It is undisputed that the overwhelming majority of low-income minorities in the Chicago metropolitan area reside in the City of Chicago. It is also undisputed that the overwhelming majority of low-rent housing in the metropolitan area is similarly located within the City of Chicago. Thus, an order against HUD limited to the City alone would mean continued location of low-income housing in the one part of the Chicago metropolitan area in which such housing and the low-income minorities who occupy it are already confined.

By contrast, an order requiring HUD to utilize the entire Chicago metropolitan area—the relevant hous-

ing market area—in determining where low-income housing should be located would afford substantially greater opportunities for securing effective relief. In short, if the order for relief is to overcome the effects of HUD's past discriminatory practices, current housing and demographic patterns dictate that HUD be required fully to utilize the entire housing market area, the relevant geographic unit for HUD programs. "It would be unsound thus to limit the geographic scope of this particular decree." *Wirtz* v. *Ocala Gas Co.*, 336 F.2d 236, 240 (5th Cir. 1964).

Second, while the first point rests on current housing and demographic patterns in the Chicago area, it is also proper for Federal equity courts to take into account what the future holds in store. The record shows that as early as 1984, less than ten years hence, Chicago will become a majority black city. If HUD is permitted to develop a remedial plan confined to the City alone, it will become an active participant in hastening the arrival of that day, thus compounding the problems stemming in part from its unlawful conduct. In devising an appropriate remedy, Federal equity courts must take into account "facts which radiate a potential for future harm." *Times-Picayune Pub. Co.* v. *U.S.*, 345 U.S. 594, 622 (1953). That is precisely what the Court of Appeals did in this case in ordering consideration of metropolitan relief.

Third, it must be recalled that the efforts of the plaintiffs and the lower courts to obtain an effective remedy have been repeatedly frustrated. The Court of Appeals refused to "burden [its] opinion with the details of the eight-year delay that has thus far deprived the appellants of the fruits of the District Court's judgment entered on July 1, 1969." 503 F.2d

at 932. In its original order, for example, the District Court required the Chicago Housing Authority (CHA) to seek the voluntary cooperation of suburban officials to construct housing outside the City. No one objected to that order. Indeed, as the Court of Appeals noted, all the parties in this case agree "that a city-only remedy will not work." 503 F.2d at 937. The CHA, however, was unable to obtain any cooperation from suburban officials. No low-income housing units were built pursuant to that provision of the District Court's order. Now, several years later, it is clear that local officials, acting alone, cannot produce the housing needed to remedy the violation. But HUD, utilizing its metropolitan-wide jurisdiction and calling on the resources of the private housing industry under the new Section 8 program, can.

In this context, its is appropriate that HUD, which to date has played a passive role in the remedial aspects of the case, now be required to adopt a more positive and affirmative approach to remedy the severe deprivations which it, together with state officials, visited on the plaintiffs. HUD is the only defendant in the case which has the authority to locate housing throughout the metropolitan area.

Fourth, NCDH also stresses the sound practical reasons why the order for relief should extend beyond the central city to the entire housing market area. Housing does not exist in a vacuum, but is closely related to achieving equal opportunity in other areas, particularly employment and education.

The harsh reality of modern-day life is that increasingly, centers of employment are being located in suburban and outlying parts of metropolitan areas,

not in central cities. Thus, the City of Chicago, during the decade 1954-63, lost more than 150,000 jobs, while other parts of the metropolitan area gained more than 200,000. United States Commission on Civil Rights, *Federal Installations and Equal Housing Opportunity* 3 (1970). These jobs, many of which could be filled by relatively unskilled persons, are virtually inaccessible to the central city, where low-income minorities are overwhelmingly confined. *Id.* at 4. As the U.S. Commission on Civil Rights pointed out:

> The surest access to suburban job centers is through provision of housing at or near these locations at prices lower-income employees can afford. *Id.* at 5.

In education, this Court, as well as numerous lower federal courts, has been struggling with the problem of school segregation on a metropolitan scale. The order for metropolitan relief which this Court rejected in *Milliken* v. *Bradley, supra,* was an effort to overcome the formidable obstacles to school desegregation caused, at least in part, by the phenomenon of housing segregation between city and suburbs. As with employment, the surest and least cumbersome way to effect school desegregation in the various school districts that exist in metropolitan areas is to provide housing opportunities, particularly for lower-income minorities, throughout the metropolitan area.

This case involves the denial of equal housing opportunity, and the relief ordered by the Court of Appeals must be evaluated in terms of its appropriateness and effectiveness in righting that wrong. NCDH urges, however, that an order limited to the City of Chicago alone, will not only be ineffective in remedying the effects of the specific violation in this case, but

is also likely to perpetuate other inequalities for the indefinite future.

NCDH strongly disagrees with HUD's invocation of the "parade of horrors" argument, which is set forth at page 37 of its brief:

> Moreover, the construction of new public housing will inevitably entail expansion of many municipal services—not only the sewers, watermains, and electricity lines directly required by the housing units, but also streets, schools, and transportation facilities, as well as the police, fire, health and similar services required by the new residents. Thus, in supervising the development and implementation of a new metropolitan area-wide housing plan, the court will have to concern itself with the need to provide a whole range of municipal services in order to make the construction and occupation of the public housing units feasible.

Of course, it must be remembered that no plan has yet been devised. Therefore, there is no way of knowing what, if any, expansion of services will be needed and how much they will cost. On remand, the Court of Appeals fully contemplates a further evidentiary hearing so that the parties will have the opportunity to examine these concerns at closer range and in the context of a specific plan which calls for dispersing housing throughout the metropolitan area.[7]

Moreover, the fact of the matter is that a well-planned program of dispersing public housing throughout the metropolitan area will not require the kind of

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[7] Even if some expense by local communities is involved, HUD is not the proper party to raise the objection. If, when a plan is proposed, local governmental bodies believe it will entail undue expenditures, they will have ample opportunity to present their evidence.

expenditures HUD envisions. The low-income blacks who presently reside in Chicago must live somewhere. It is axiomatic that municipal services need to be provided for them wherever they reside. How can it be, therefore, that the movement of low-income blacks from the City to the suburbs will require a significant increase in the total money appropriated for such services? Ever since the suburbia movement began, suburban municipalities have been confronted with the problem of expanding services to meet new needs. Placing low-income housing in the suburbs must, of course, conform to local zoning regulations, including density provisions. Thus, whether housing on a particular site is constructed for low- or moderate- or upper-income persons, the municipal facilities needed to support that increased population would appear to be the same. But again there is no way of calculating now what, if any, costs would have to be borne by municipal governments under a HUD metropolitan plan. HUD's contention is at best speculative and premature.

CONCLUSION

For the foregoing reasons, NCDH respectfully urges this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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September 15, 1975